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In re Application of :
Matsuda, et al. :
Application No.: 10/749,459 :
Filed: December 30, 2003 :
Attorney Docket No.: OCA-184-A :

OFFICE OF PETITIONS

ON PETITION

This is a decision on the petition filed May 18, 2004, to have the above-cited application accorded a filing date of December 26, 2003, rather than the presently accorded filing date of December 30, 2003. The petition will be treated as a petition under 37 CFR 1.183 to waive the requirements of 37 CFR 1.53.

The petition is **dismissed**.

Petitioner requests that the filing date accorded the application be changed from December 30, 2003, to December 26, 2003. In support thereof, petitioner maintains that human error resulted in the application papers not being deposited with the United States Postal Service Express Mail Service until December 30, 2003, but that it was the intention of petitioner to have the application filed on December 26, 2003. Specifically, petitioner maintains that an employee of petitioner's office became overwhelmed with other assignments—some being the filing of other patent applications—and went on a scheduled vacation and forgot that the above-cited application was not filed with the Patent and Trademark Office. Petitioner argues human error is to be expected and is understandable, but that the client should not be made to suffer for the failings of the employee, therefore; the application should be accorded the filing date that petitioner intended the application to have of December 26, 2003.

Petitioner's arguments have been considered, but are not persuasive. Section 1.53 of Title 37 of the Code of Federal Regulations explains that the filing date of an application for patent is the date on which a specification, at least one claim, and any drawings required are filed in the Patent and Trademark Office. It is also noted that 37 CFR 1.10 indicates that correspondence received by United States Postal Service Express Mail will be considered filed on the date of deposit with the United States Postal Service—with the "date-in" on the Express Mail label being the date of deposit. Petitioner is requesting that the Office waive these requirements and grant this application a filing date on a date when the application was not physically in the Patent and Trademark Office, or the United States Postal Service, or even in route to the Office.

Certainly, human error in the patenting process is understandable and, in some cases, errors caused by such failings are justifiable reasons for granting the remedy requesting. The circumstances explained by petitioner, while unfortunate, do not merit suspension of the rules regarding what is necessary to accord an application a filing date. The attorneys of record and those in their employ have been retained to assist the inventive entity with the prosecution of the application. Implicit in the relationship created between the attorney of record or patent agent and the inventive entity is the understanding that the inventive entity will reap any benefits of the competence of the attorneys of record in the application's prosecution, and will likewise suffer any consequence of the failures of the attorneys of record and their staff in the application's prosecution. Based on the facts offered in the instant petition, it is not believed that justice would not require waiver of the requirements of 37 CFR 1.53 or 37 CFR 1.10 as it would surely be an extraordinary remedy to accord the application a filing date based solely on the date the applicant intended to file the application, notwithstanding the fact that the application was not in route to the Office or with the United States Postal Service on that date.

Further, the requirements of 37 CFR 1.10 and 1.53 are grounded in 35 U.S.C. 21 that mandates that:

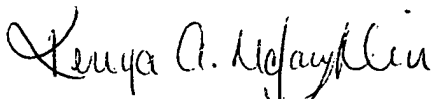
[t]he Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated by the Director.

Absent postal emergencies or emergencies designated by the Director, papers are considered filed when they are deposited with United States Postal Service provided applicant has made use of the certificate of mailing procedures under 37 CFR 1.8 and/or the Express Mail procedures under 37 CFR 1.10. Requirements of the rules that are based in statutory law cannot be suspended or waived pursuant to 37 CFR 1.183, therefore; petitioner requests that the requirements of 37 CFR 1.10 and 1.53 be waived cannot be granted based on the facts presented.

The petition fee of \$130.00 will be charged to Deposit Account 50-0744.

The application will be directed to the Office of Initial Patent Examination for further processing with a filing date of December 30, 2003.

Telephone inquiries concerning this matter may be directed to the undersigned at (703) 305-0010.



Kenya A. McLaughlin
Petition Attorney
Office of Petitions